Supreme Court, U.S.
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No. 93-

In The

Supreme Court of the United States

October Term, 1993

IN RE GRAND JURY PROCEEDINGS

KIMBERLY JEANNINE TRIMIEW,
DEBORAH STOUT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ Of Certiorari
To the United States Court of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1. Petitioners are targets of a nationwide criminal investigation. They were granted use immunity under 18 U.S.C. § 6002, but refused to testify before a federal grand jury. They were jailed for contempt. Did the lower courts err by disregarding as unripe their defense to contempt that the immunity they were granted is constitutionally inadequate because the federal courts nationwide lack procedures which will reasonably guard against prospective use of their compelled testimony against them in violation of their Fifth Amendment privilege?

2. Do the Fifth Amendment and 18 U.S.C. § 6002 require that certain minimum standards and procedures apply at a hearing afforded under *Kastigar v. United States* to a defendant who has previously been compelled to testify, to reasonably ensure that evidence which was compelled from the witness/defendant is not used against her in violation of the Fifth Amendment?

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No. 93-___

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To the United States Court of Appeals
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OPINIONS BELOW

The memorandum opinion of the Court of Appeals is not reported; it is reproduced at Appendix pp. 1-5. The opinions of the district court were not reported; they are reproduced at Appendix pp. 6-8 (Trimiew) and pp. 9-11 (Stout) (the two cases were later consolidated on appeal).

The opinions of the Court of Appeals on a previous appeal by Trimiew were reported at 9 F.3d 1388 (9th Cir.

1993) (hereinafter "Trimiew I") and 9 F.3d 1389 (9th Cir. 1993) (hereinafter "Trimiew II"), and are reproduced at Appendix pp. 12-20. The orders of the district court which led to that appeal were not reported; they are reproduced at Appendix pp. 21-25.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the refusal of a witness to give potentially incriminatory testimony before a grand jury for fear that her evidence may subsequently be used to help convict her. The case thus implicates the Fifth Amendment to the United States Constitution (set out verbatim at Appendix p. 26), 18 U.S.C. §§ 6001-6003 (set out verbatim at Appendix pp. 27-30) and 28 U.S.C. § 1826(a) (set out verbatim at Appendix p. 31).

STATEMENT OF THE CASE

The government alleges that Petitioners Kimberly Trimiew and Deborah Stout are actively associated with a group called the "Animal Liberation Front," and that this

organization has engaged in criminal destruction of property in various locations nationwide. Two federal agencies, the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco and Firearms are actively investigating these alleged crimes.

The investigation reaches into many districts across the country. Petitioners are both under investigation in the Eastern and Western Districts of Washington. The government has expressed the view that Trimiew, a resident of Oregon, may have been involved in crimes in as many as fifteen different judicial districts. A grand jury in Oregon has twice subpoenaed Trimiew to furnish hair and saliva samples, finger prints, palm prints and shoe prints, and to be photographed. A grand jury in Michigan subpoenaed one of Trimiew's relatives to inquire about Trimiew's possible presence in Michigan at relevant times. The Michigan grand jury has indicted a person named Rodney Coronado for a related offense. Coronado is now a fugitive.

The grand jury in the Eastern District of Washington at Spokane queried Stout, a resident of Montana, about her possible presence when offenses were apparently committed in Eastern Washington and Idaho, and about whether she had a relationship with, or knowledge about, Rodney Coronado or Kim Trimiew. Trimiew was subpoenaed before two successive grand juries in Spokane and was queried, *inter alia*, about her whereabouts in relation to offenses apparently believed to have been committed in the states of Washington, Oregon, Virginia, Montana, Idaho, Michigan and Ohio. She, too, was questioned about any relationship with Rodney Coronado and Deborah Stout.

Trimiew and Stout have each refused to answer these questions, citing their Fifth Amendment privilege against self-incrimination.

Trimiew was first subpoenaed to testify before the grand jury in the Eastern District of Washington in August, 1993. Before she appeared, the Government invoked the district court's jurisdiction under 18 U.S.C. § 6001-6003 and obtained an anticipatory, *ex parte* order directing Trimiew to testify notwithstanding any claim of privilege to avoid self-incrimination, and granting her the limited immunity afforded by 18 U.S.C. § 6002 from any use of such testimony as she might give.

Trimiew refused to testify on Fifth Amendment grounds. The government invoked the district court's jurisdiction under 28 U.S.C. § 1826(a), and moved for an order of contempt. Trimiew informed the court that the investigation was national in scope and had apparently not been successful to date in turning up useful evidence. Trimiew argued that under those circumstances, where her evidence could potentially open leads not previously pursued by the government, the risk of her evidence becoming the basis for a prosecution against her in some indirect way which might be impossible to later retrace was unreasonably high. She asked the court to impose limitations on the use of and access to any evidence she might give, and to require the government to specify to the court at that time the exact state of its knowledge (referred to in jargon as "canning" the evidence[1]) so as to

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[1] *See, e.g., Trimiew II*, 9 F.3d 1389, 1390 (9th Cir. 1993) (Appendix p. 13).

reduce the risk of any future misuse of her compelled testimony, and to increase the odds of detecting any inadvertent or indirect derivative use of her testimony. The district court refused, held Trimiew in contempt, ordered her confined in jail and denied bail (Appendix pp. 21-25).[2]

Trimiew appealed to the United States Court of Appeals for the Ninth Circuit. While that Court recognized that Trimiew's unusual circumstances presented "an issue of first impression", it denied her appeal. The Court of Appeals held that Trimiew was entitled to a *Kastigar*[3] hearing in the event she were ever indicted.

> The multi-jurisdictional nature of the investigation may add a layer to any eventual *Kastigar* hearing. This does not, however, create a situation where it will be impossible to determine the origin of the information. If Trimiew is indicted in any jurisdiction, she will be entitled to a *Kastigar* hearing in order to determine whether her indictment was based in any way on her own testimony to the grand jury in Spokane.

Trimiew II, 9 F.3d at 1391 (reproduced at Appendix pp. 16-17).

After the mandate issued, the grand jury never recalled Trimiew before its term expired and it was disbanded.

A new grand jury was convened in January, 1994. Trimiew was again subpoenaed to appear before it, and

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[2] The Court of Appeals reversed the denial of bail, and Trimiew was released fifteen days after she was jailed. Trimiew I, 9 F.3d at 1388-89 (9th Cir. 1993) (reproduced at Appendix pp. 18-20).

[3] *Kastigar v. United States*, 406 U.S. 441 (1972).

the government again invoked the district court's jurisdiction under 18 U.S.C. §§ 6001-6003 to obtain an anticipatory *ex parte* order requiring her to testify and granting use immunity. Deborah Stout was also subpoenaed, and was also made the subject of an *ex parte* order under 18 U.S.C. §§ 6001-6003.

Trimiew and Stout (hereinafter collectively "Petitioners") refused to testify, and the government again invoked the district court's jurisdiction under 28 U.S.C. § 1826(a), seeking to have them held in contempt and jailed.

Petitioners resisted the motion.[4] At a contempt hearing on February 18, 1994, Petitioners argued that the immunity extended to them under 18 U.S.C. § 6002 was not co-extensive with their right to remain silent. Petitioners pointed out that while the Court of Appeals had ruled that Trimiew was entitled, at a later *Kastigar* hearing, to inquire fully into whether there had been any use of her compelled testimony, the court had not considered whether Petitioners had the same entitlement, under prevailing local interpretations of the Fifth Amendment and *Kastigar*, in every judicial district in which Petitioners might be indicted. Petitioners demonstrated that *Kastigar* procedures are not uniform nationwide, do not invariably afford the type of inquiry contemplated in *Trimiew II*, and are not reasonably certain to prevent all use of compelled testimony.

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[4] Petitioners reserved the arguments which had been rejected in *Trimiew II* in both the district court and subsequently in the Court of Appeals.

Petitioners asked the district court either to condition any contempt order it might issue by requiring the government to ensure adequate procedures to prevent any violation of Petitioners' privilege wherever they might later be indicted, or, if no such order could be made, to decline to hold Petitioners in contempt on the ground that the immunity extended to Petitioners was constitutionally deficient.

The government did not defend the efficacy of *Kastigar* procedures employed by the courts around the country, but instead argued that Petitioners' worries about their privilege against self incrimination were premature. The government argued that only if they were later indicted would Petitioners have cause for concern about whether the testimony the government is trying to force from them now is being obtained in violation of their Fifth Amendment privilege, and that in no event would the Court have power to make the conditional order requested by Petitioners binding on any other court.

The district court agreed (Appendix pp. 6-11), denied bail, and jailed Petitioners on February 18, 1994. The U.S. Court of Appeals for the Ninth Circuit, to whom Petitioners appealed under 28 U.S.C. §§ 1291 and 1826, affirmed on grounds identical to those underlying the district court's decision (Appendix pp. 1-5). Petitioners remain in jail in Spokane, Washington.

REASONS FOR GRANTING THE WRIT

1. The courts below expressly held that a witness cannot raise, as a defense to contempt, the constitutional inadequacy of the immunity granted to her (the immunity is inadequate because the procedures employed by the courts in relation to compelled witnesses who are later indicted in violation of their Fifth Amendment rights do not give sufficient prospective assurance that their compelled testimony will not be used against them). The decisions below directly conflict with the unambiguous decisions of this Court to the contrary, which hold that a person may *not* be held in contempt for refusal to testify on Fifth Amendment grounds unless immunity is granted which is "as comprehensive as the protection afforded by the privilege" not to answer under the Fifth Amendment. *See Kastigar*, 406 U.S. at 449. *See* Rules of Supreme Court of the United States, Rule 10.1 (b).

2. In *Kastigar v. United States*, this Court did not specify the standards and procedures required to be employed at the hearing which the Court said was required to ensure that compelled testimony is not used against a defendant in violation of the Fifth Amendment and 18 U.S.C. § 6002. Over the twenty years since *Kastigar* was decided the lower courts have employed a variety of inconsistent (and sometimes conflicting) standards and procedures, which often do not reasonably assure that compelled testimony will not be used against a defendant. This Court should take this case to announce the minimum constitutional standards and procedures to be employed at *Kastigar* hearings to reasonably ensure that compelled testimony is not used in any way against those

from whom it is compelled. As the lower courts observed (Appendix p. 4, n.3; 6), this Court is the *only* court that can announce standards which will prospectively apply nationwide: no inferior court can dictate procedures to be followed in other circuits. This case thus presents both a federal question of broad public importance and a question involving certain conflicts among the circuits. *See* Rules of the Supreme Court of the United States 10.1(a) and (c).

DISCUSSION

1. PETITIONERS' DEFENSE IS RIPE FOR DECISION NOW

Even though Petitioners have been adjudged in civil contempt, and are presently incarcerated, the courts below both held that Petitioners must be indicted before the courts can review the claim that the immunity given Petitioners is constitutionally inadequate (given the absence of sufficient procedures to reasonably ensure against use of their immunized testimony against them). *See* Appendix pp. 4, 6-7. These rulings were erroneous. Petitioners' claim is clearly ripe pursuant to this Court's long line of civil contempt cases, including *Kastigar*.

In *Kastigar*, the petitioners were subpoenaed and granted use immunity under 18 U.S.C. §§ 6002 and 6003. *Kastigar*, 406 U.S. at 442. However, petitioners continued to invoke their Fifth Amendment privilege before the grand jury. *Id.* The district court found the petitioners in contempt and remanded them to the custody of the Attorney General, and the Ninth Circuit affirmed. *Id.* at 442-43.

The Court granted certiorari to address the important constitutional questions at the contempt stage, despite the fact that petitioners had yet to be indicted. This Court said:

> If . . . the immunity granted is not as comprehensive as the protection afforded by the privilege, Petitioners were justified in refusing to answer, and the judgments of contempt must be vacated.

Id. at 449.

Similarly, the Court has reviewed the claims of non-indicted petitioners under civil contempt orders in several cases prior to *Kastigar*[5].

In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Court directly addressed the issue of ripeness in a self-incrimination case. After petitioners invoked the Fifth Amendment[6] and refused to register

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[5] *See, e.g., Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) (review granted where petitioner who was granted state transactional immunity resisted subpoena because of fear of federal prosecution); *Ullman v. United States*, 350 U.S. 422 (1956) (unindicted petitioner invoked Fifth Amendment and was being held in contempt when Supreme Court granted review); and *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (Supreme Court granted review where unindicted petitioner invoked Fifth Amendment in civil proceedings).

[6] Acknowledging membership in the Communist Party would have subjected petitioners to prosecution under at least two federal statutes, the Smith Act, 18 U.S.C. § 2385 (1964 ed.) or under the Subversive Activities Control Act, 50 U.S.C. § 783(a) (1964 ed.). *Albertson*, 382 U.S. at 77. Immunity granted under the Subversive Activities Control Act in return for compliance was

under the Subversive Activities Control Act of 1950,[7] the Attorney General petitioned the Subversive Activities Control Board to order compliance. *Albertson*, 382 U.S. at 71-73. After evidentiary hearings, the Board issued orders requiring petitioners to comply with the Act, and petitioners appealed. *Id.* at 73. The Court of Appeals for the District of Columbia Circuit affirmed the orders, holding that the issue was not ripe for review, and would ripen if and when petitioners were prosecuted for failure to register. *Id.* at 74. This Court reversed the decision, and held that petitioners' challenges were appropriate for adjudication because the orders had been issued, petitioners had refused to comply with them, and petitioners risked heavy penalties for failing to register:

> Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so.

Id. at 75-76.

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held by this Court to be violative of the Fifth Amendment, as it did not preclude the use of the required information either as evidence or as an investigatory lead. *Id.* at 80.

[7] 64 Stat. 993-994, 50 U.S.C. § 786(d)(4) (1964 ed.), *cited in Albertson*, 382 U.S. at 77.

Contrary to the decisions of the courts below, a person is simply not required to forfeit the Fifth Amendment privilege and wait for prosecution before a court may review the constitutionality of the matter. When a person disobeys an order to reveal potentially self-incriminating information, that order is reviewable, and the defense that the refusal to answer is justified by the Fifth Amendment is ripe for decision. Petitioners have been ordered to comply with the grand jury subpoena, and are currently in jail on account of their disobedience. Petitioners are entitled to a determination whether that order is constitutional.

2. THIS COURT ALONE CAN PRESCRIBE NATIONAL STANDARDS UNDER *KASTIGAR*

Kastigar presented the question whether a grant of "use immunity" (as opposed to full "transactional immunity") to a witness who is compelled to testify under 18 U.S.C. § 6002 was sufficient to avoid violation of the Fifth Amendment privilege against compelled self-incrimination. The Court said it was. In reaching that conclusion, the Court heavily and repeatedly stressed that it could only be true so long as the immunity granted was "coextensive with the privilege"[8], by which the Court said it meant the terms of the immunity must "prohibit the prosecutorial authorities from using the compelled testimony in *any* respect . . . "[9] This prohibition is "total"[10]

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[8] 406 U.S. at 449, 450, 453, 458, 459, 461.

[9] *Id.* at 453 (emphasis in original).

[10] *Id.* at 460.

and bars the use of compelled testimony as an investigatory lead or even to focus an investigation on the witness as a result of her disclosures.[11]

Having thus decided the issue, the Court unfortunately dwelt only briefly on what mechanisms should be adopted to ensure against violations of the privilege. The Court adopted the rule of *Murphy v. Waterfront Commission*[12] that:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for their disputed evidence.

Kastigar, 406 U.S. at 460. (*quoting Murphy*, 378 U.S. at 79, n. 18).

The Court described this as a "heavy burden", but said nothing further about how such a hearing might be conducted.

Justice Marshall, dissenting, worried that prosecutors "alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary

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[11] *Id.* The Court thus *reaffirmed* the principle which was laid down in *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and "reiterated" in *Ullman v. United States*, 350 U.S. 422 (1956).

[12] 378 U.S. 82 (1964).

to prove it."[13] The Court did not address that point, apparently preferring to leave it to the lower courts to "fashion[ ] the necessary rule"[14] in light of the unambiguous principle set down in *Counselman*,[15] *Ullman*,[16] and *Kastigar* itself that no immunity is constitutional which does not utterly forbid *any* use of an accused's compelled evidence against the accused in *any* respect.

The lower courts have now had twenty years to develop a post-*Kastigar*, Fifth Amendment jurisprudence. Their record of fidelity to the *Counselman-Ullman-Kastigar* principle is disappointing. As a consequence, Petitioners here, who may be formally accused in as many as fifteen different districts across the country, now completely lack assurance that any evidence they are compelled to give will not be used against them "in *any* respect." They respectfully entreat this Court to take this case and declare what specific procedural rights an accused does have at a *Kastigar* hearing.

Petitioners respectfully assert that to meaningfully ensure that there is *no* use, willing or inadvertent, of evidence they are forced to give, and to make it possible timely to detect and prevent any such use in evidence against them, the Fifth Amendment requires that the government "can" all its evidence as of the date compulsion is applied to a witness, so there is no later dispute as to the state of the government's knowledge at the time of

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[13] *Kastigar*, 406 U.S. at 469.

[14] *Chapman v. California*, 386 U.S. 18, 21 (1967).

[15] 142 U.S. 547 (1892).

[16] 350 U.S. 442 (1956).

compulsion; that the government keep trial counsel and trial witnesses away from the compelled evidence, so that no tactical advantage inures to the government from a "preview" of a defendant's evidence; that after an indictment an adversary hearing be held, *before* trial, preceded by full discovery into the government's investigatory processes; and that at such a hearing the government must carry the burden of proof that both negates any taint and affirmatively shows an independent source for the evidence proffered by clear and convincing evidence. Short of that, no recalcitrant witness can ever be reasonably assured that the evidence wrested from her will absolutely not be used against her.[17]

Nowhere in the country are all these procedural protections extended to the witness-turned-defendant.

No circuit clearly requires the government to "can" its evidence, though one has implied it is the only practical way for the government to meet its "heavy burden" of

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[17] That is especially true where, as here, the government decides to grant immunity at an early, as opposed to later stage in its investigation, or, as here, where the investigation appears to be completely frustrated to date. In these circumstances the likelihood is far greater that any evidence later offered against Petitioners will have some attenuated or indirect connection to any evidence they have been compelled to give.

disproving taint,[18] and others have approved the government's volunteering to do so.[19]

Some circuits permit trial counsel and witnesses to review immunized evidence for "tactical" or "non-evidentiary" purposes; others forbid it as a plain violation of the Fifth Amendment.[20]

Hearings are not always held. Some courts believe an evidentiary hearing is discretionary, or that an *ex parte, in camera* review by the trial judge is sufficient to carry out the government's burden.[21]

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[18] *United States v. Poindexter*, 951 F.2d 369, 376 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct 656 (1992). From a purely practical point of view, a requirement that the government detail its evidence against a witness before the witness testifies under compulsion also reduces the ultimate burden on the parties and the courts to reconstruct the government's prior knowledge.

[19] *See, e.g., In Re Weir*, 377 F.Supp. 919, 924 (S.D. Cal.), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied sub nom. Weir v. United States*, 491 U.S. 1035 (1974).

[20] *See* discussion in *United States v. North*, 910 F.2d 843, 857-860, *opinion after rehearing*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2235 (1991).

[21] *See, e.g., United States v. Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1989), *cert. denied*, 490 U.S. 1006 (1989) (upholding denial of defendant's *Kastigar* claim following *in camera* review); *United States v. Beachner Const. Co.*, 538 F.Supp. 718, 721 (D. Kan. 1982) (no oral, evidentiary hearing required); *United States v. Helmsley*, 941 F.2d 71, 80, *cert. denied*, ___ U.S. ___, 112 S.Ct. 1162 (1992), (post trial, limited evidentiary hearing tacitly approved); *United States v. Sockwell*, 699 F.2d 213, 217 (5th Cir. 1993), *cert. denied*, 461 U.S. 936 (1983) (*in camera* review sufficient to determine that government did not use immunized testimony to indict); *see also United States v. Rogers*, 722 F.2d 557, 560 (9th Cir.

Plainly, where no adversary hearing is even held, no meaningful opportunity for discovery or cross-examination to test the government's assertions exists either.[22] Hearings are not uniformly required to be held before trial. The timing is in some places left to the discretion of the district court, thus leaving some defendants in the position of having to face unnecessary trials.[23]

The circuits are not in accord as to the burden of proof. Some indulge presumptions[24] or permit the burden of proof of a taint to be shifted to the defendant, after the government makes some initial showing.[25]

Finally, while some courts require the government to prove the absence of taint and the existence of independent grounds by clear and convincing evidence,[26] the

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1983), *cert. denied*, 469 U.S. 835 (1984) (shifting burden to defendant to prove government made no use of immunized evidence); *cf. United States v. Zielezinski*, 740 F.2d 727, 733-34 (9th Cir. 1984), *appeal after remand*, 756 F.2d 1448 (9th Cir. 1985) (evidentiary hearing held).

[22] *See North*, 910 F.2d at 857 (discovery); *North*, 920 F.2d at 944 (cross-examination).

[23] *See, e.g., North*, 910 F.2d at 843. This Court has recognized that exposure to a criminal trial is harm of itself and that persons accused of crimes have a fundamental constitutional interest in avoiding unnecessary trials. *See Abney v. United States*, 431 U.S. 651 (1977).

[24] *See United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983).

[25] *North*, 920 F.2d at 944.

[26] *See, e.g., United States v. Carpenter*, 611 F. Supp. 768, 776 (N.D. Ga. 1985); *United States v. Smith*, 580 F.Supp. 1418, 1421-22 (D.N.J. 1984); *United States v. Rice*, 421 F.Supp. 871, 877 (E.D. Ill. 1976).

majority require only proof by a mere preponderance of the evidence.[27]

Under the circumstances, Petitioners have absolutely *no* assurance, if they are indicted after having been forced to give incriminatory evidence, that the evidence they have given has been handled in any way calculated to minimize even inadvertent use to further the investigation which might lead to other evidence against them. They have no assurance that the government's current state of knowledge can ever be recreated for purposes of comparison to the evidence which may later be used against them. They do not even have any assurance that they will ever be given a meaningful opportunity to inquire, to learn whether, and how, their evidence influenced the investigation or to challenge the government's doubtless earnest insistence that it did not.

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[27] *See, e.g., North*, 910 F.2d at 873; *United States v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992); *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974); *United States v. Rogers*, 722 F.2d at 560.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED this 24th day of June, 1994

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	No. 94-35200
DEBORAH STOUT, Witness-Appellant, vs. UNITED STATES OF AMERICA, Appellee.	D.C. No. MAG 94-37A
IN RE GRAND JURY PROCEEDINGS	No. 94-35201
KIMBERLY JEANNINE TRIMIEW, Witness-Appellant, vs. UNITED STATES OF AMERICA, Appellee.	D.C. No. MAG 94-38A MEMORANDUM* (Filed Mar. 28, 1994)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Appeals from the United States District Court
for the Eastern District of Washington
William Fremming Nielsen, District Judge, Presiding

Submitted March 23, 1994**

Before: FLETCHER, BRUNETTI and TROTT, Circuit Judges.

INTRODUCTION

Appellants Deborah Stout and Kimberly Trimiew appeal from the district court judgments holding them in contempt for refusing to testify before the grand jury. This court reviews the district court's adjudication of civil contempt for an abuse of discretion. *United States v. Grant*, 852 F.2d 1203, 1204-05 (9th Cir. 1988). This court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1826(a). We affirm.

BACKGROUND

In early January 1994, appellants Trimiew and Stout were each granted use immunity and were ordered to testify before the grand jury pursuant to 18 U.S.C. § 6002. On January 25, 1994, Trimiew and Stout appeared before the grand jury under subpoena and refused to respond to questions posed, on claims of Fifth Amendment privilege. The government moved for Trimiew and Stout to be held in contempt. At a district court hearing held on February 18, 1994, Trimiew and Stout contended that because they

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**The panel unanimously agrees that this case is appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and Ninth Cir. R. 34-4.

are targets of multiple jurisdictional investigations, and because the procedures associated with a hearing pursuant to *United States v. Kastigar*, 406 U.S. 441 (1972) vary among the federal jurisdictions in which they are potential targets, the use immunity extended to them under 18 U.S.C. § 6002 was not co-extensive with their Fifth Amendment right to remain silent. Appellants request that this court institute certain procedural requirements into any future *Kastigar* hearings to protect their Fifth Amendment rights.[1]

ANALYSIS

In November 1993, this court affirmed a contempt citation, pursuant to 28 U.S.C. § 1826(a), against appellant Trimiew. *In re Grand Jury Proceedings (Trimiew)*, 9 F.3d 1389 (9th Cir. 1993) (*Trimiew II*).[2] This court held that a hearing pursuant to *Kastigar* alone is sufficient to protect a grand jury witness' Fifth Amendment rights, and that a multiple jurisdiction investigation did not entitle a grand jury witness to special protections prior to a *Kastigar* hearing. *Trimiew II*, 9 F.3d at 1391.

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[1] In *Kastigar*, the Supreme Court held that if a witness is indicted after testifying before a grand jury, the district court should hold an evidentiary hearing. At this hearing, the government has the burden of showing, by a preponderance of the evidence, that the evidence it proposes to use to prosecute the witness is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar*, 406 U.S. at 460-61.

[2] *Trimiew I* is a published order holding that Trimiew was entitled to bail pending appeal because the issue she presented was not frivolous. *In re Grand Jury Proceedings (Trimiew)*, 9 F.3d 1388 (9th Cir. 1993).

Appellants request that we establish specific procedures in any future *Kastigar* hearing to ensure that their Fifth Amendment rights are protected. Specifically, appellants request that this court order the district court to guarantee that it will provide "procedural rights" including a full evidentiary hearing, conducted before appellants are tried, complete discovery, establishing the burden of proof to be used at this hearing, and ensuring that any compelled testimony is not used for a "non-evidentiary" purpose.[3]

This request is premature. In *Trimiew II*, this court held that a witness held in civil contempt is not entitled to the imposition of special protections prior to indictment. *Trimiew II*, 9 F.3d at 1391. In *Kastigar*, the Supreme Court held that a witness is entitled to a hearing if the witness is "subsequently prosecuted." *Kastigar*, 406 U.S. at 460. Here, appellants have not been indicted in any jurisdiction. It is unclear where, when and if they will be prosecuted. It is premature to request that this court instruct the district court how to conduct a *Kastigar* hearing which may never occur. Appellants are not entitled to

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[3] Trimiew and Stout allege that they are targets of grand jury investigations in up to 15 jurisdictions, including the District of Oregon and the Eastern District of Washington. These two district courts are under our jurisdiction. 28 U.S.C. § 41. Appellants request that we exercise jurisdiction over all district courts in the United States where they might be targets of a grand jury investigation. This court has jurisdiction only over district courts which it statutorily embraces. 28 U.S.C. §§ 41, 1294. Accordingly, we cannot dictate to district courts outside of our jurisdiction how to conduct *Kastigar* hearings.

enunciation of special procedural rights prior to indictment. *Trimiew II*, 9 F.3d at 1391. Accordingly, the district court judgments of contempt are **AFFIRMED.**

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE:	)	MAGISTRATE
GRAND JURY INVESTIGATION	)	NOS. 94-0038A-01
KIMBERLY JEANNINE TRIMIEW,	)	ORDER

A hearing was held in the above entitled matter on February 18, 1994 before the undersigned. Appearing on behalf of the government was Frank Wilson; appearing on behalf of Kimberly Trimiew was Stephen Houze and Leslie Weatherhead. This Order is intended to memorialize the oral rulings of the court.

Ms. Trimiew has been granted immunity and yet refuses to testify before a federal grand jury sitting in Spokane. She claims if forced to testify, she will be compromising her Fifth Amendment right to not testify against herself. Ms. Trimiew claims the use immunity granted by the government to her is not sufficient to protect that right. She points to the fact that she is under investigation in other circuits and that not all circuits guarantee a *Kastigar* hearing if she is later prosecuted. She also claims the government should promise additional safeguards to ensure that her testimony can never be used against her at subsequent hearings. It is the opinion of this court that it has no authority to mandate a *Kastigar* procedure in another circuit if there is a subsequent prosecution. It is further the finding of this court that the issue is not ripe, until there is a subsequent

indictment there is no issue of whether a *Kastigar* hearing is necessary.

Having found the petitioner's arguments to be without merit and having learned she still does not wish to testify, the court finds Ms. Trimiew to be in contempt of court for refusal to testify. She indicates that she will appeal this order, therefore the issue arises of whether Ms. Trimiew will be released pending appeal. If the appeal is frivolous or taken for purposes of delay, she should be confined pending appeal. 28 U.S.C. § 1826(b). This court finds that the appeal is not taken for purposes of delay; however, these issues have already been decided by the Ninth Circuit in *In re: Grand Jury Proceedings*, 9 F.3d 1389 (9th Cir. 1993) (Trimiew I) wherein the Ninth Circuit affirmed this court's judgment of contempt and found that no additional procedures were necessary to protect Ms. Trimiew's Fifth Amendment rights. Id. at 1391. As there is no arguable basis for a successful appeal by the petitioner, her appeal must be deemed frivolous. Accordingly,

IT IS ORDERED that:

1. Kimberly Jeannine Trimiew is in contempt of court for refusing to answer questions posed to her in front of the grand jury.

2. Petitioner's motion for release pending appeal, be and the same is hereby DENIED.

3. Kimberly Jeannine Trimiew shall be confined in the custody of the United States Marshal until such time as she is willing to testify before the grand jury. This period of confinement shall not exceed the term of the

grand jury, including extensions, but in no event shall such confinement exceed eighteen (18) months.

4. If Ms. Trimiew indicates she is willing to testify, she will be immediately released whether or not the grand jury is currently in session. She shall then make herself available and give testimony as soon as the grand jury reconvenes.

The Clerk is directed to file this Order and forward copies to counsel and the United States Marshal.

DATED this 25th day of February, 1994.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT
JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE:	)	MAGISTRATE
	)	NOS. 94-0037A-01
GRAND JURY INVESTIGATION	)	
	)	ORDER
DEBORAH STOUT,	)	
	)	

A hearing was held in the above entitled matter on February 18, 1994 before the undersigned. Appearing on behalf of the government was Frank Wilson; appearing on behalf of Deborah Stout was Philip Wetzel [sic.]. This Order is intended to memorialize the oral rulings of the court.

Ms. Stout has been granted immunity and yet refuses to testify before a federal grand jury sitting in Spokane. She claims if forced to testify, she will be compromising her Fifth Amendment right to not testify against herself. Ms. Stout claims the use immunity granted by the government to her is not sufficient to protect that right. She points to the fact that she is under investigation in other circuits and that not all circuits guarantee a *Kastigar* hearing if she is later prosecuted. She also claims the government should promise additional safeguards to ensure that her testimony can never be used against her at subsequent hearings. It is the opinion of this court that it has no authority to mandate a *Kastigar* procedure in another circuit if there is a subsequent prosecution. It is further the finding of this court that the issue is not ripe, until

there is a subsequent indictment there is no issue of whether a *Kastigar* hearing is necessary.

Having found the petitioner's arguments to be without merit and having learned she still does not wish to testify, the court finds Ms. Stout to be in contempt of court for refusal to testify. She indicates that she will appeal this order, therefore the issue arises of whether Ms. Stout will be released pending appeal. If the appeal is frivolous or taken for purposes of delay she should be confined pending appeal. 28 U.S.C. § 1826(b). This court finds that the appeal is not taken for purposes of delay; however, these issues have already been decided by the Ninth Circuit in *In re: Grand Jury Proceedings*, 9 F.3d 1389 (9th Cir. 1993) (*Trimiew I*) wherein the Ninth Circuit affirmed this court's judgment of contempt and found that no additional procedures were necessary to protect Ms. Trimiew's Fifth Amendment rights. *Id.* at 1391. This holding also applies to Ms. Stout. As there is no arguable basis for a successful appeal by the petitioner, her appeal must be deemed frivolous. Accordingly,

IT IS ORDERED that:

1. Deborah Stout is in contempt of court for refusing to answer questions posed to her in front of the grand jury.

2. Petitioner's motion for release pending appeal, be and the same is hereby DENIED.

3. Deborah Stout shall be confined in the custody of the United States Marshal until such time as she is willing

to testify before the grand jury. This period of confinement shall not exceed the term of the grand jury, including extensions, but in no event shall such confinement exceed eighteen (18) months.

4. If Ms. Stout indicates she is willing to testify, she will be immediately released whether or not the grand jury is currently in session. She shall then make herself available and give testimony as soon as the grand jury reconvenes.

The Clerk is directed to file this Order and forward copies to counsel and the United States Marshal.

DATED this 25th day of February, 1994.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT
JUDGE

APPENDIX 4

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS KIMBERLY TRIMIEW, Witness-Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 93-35953 D.C. No. MAG-93-330-WFN OPINION (Filed Nov. 12, 1993)

Appeal for the United States District Court for the Eastern District of Washington
William Fremming Nielsen, District Judge, Presiding

Submitted November 9, 1993*

Before: SCHROEDER, D.W. NELSON and THOMPSON, Circuit Judges

INTRODUCTION

Appellant Kimberly Trimiew appeals from the district court judgment holding her in contempt for refusing to testify before the grand jury. This court reviews the district court's adjudication of civil contempt for abuse of

*The panel unanimously agrees that this case is appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and Ninth Cir. R. 34-4.

discretion. *United States v. Grant*, 852 F.2d 1203, 1204-1205 (9th Cir. 1988). This court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1826(a). We affirm.

BACKGROUND

On or about July 7, 1993, appellant Kimberly Trimiew was subpoenaed to testify before a grand jury in Spokane, Washington. On August 9, 1993, the district court signed an order granting Trimiew immunity, pursuant to 18 U.S.C. § 6002. On August 10, 1993, Trimiew appeared before the grand jury. The Assistant United States Attorney attempted to question Trimiew regarding her alleged participation in bombings and other actions of the animal rights movement which occurred in jurisdictions other than the Eastern District of Washington. Trimiew invoked her Fifth Amendment privilege against self-incrimination and refused to testify.

Trimiew argued that because she is a target in a multi-district investigation, use and derivative use immunity were insufficient to protect her Fifth Amendment rights. Trimiew requested that the district court order the Justice Department to "can" the evidence it now has against Trimiew, and present it at an in camera hearing. Alternatively, Trimiew suggested that the government agree to give Trimiew transactional immunity. The government refused to agree to additional safeguards as requested by Trimiew.

The district court denied Trimiew's request for procedural safeguards to protect her Fifth Amendment privilege, and indicated that it believed that Trimiew's rights would be protected through the provisions of a hearing

pursuant to *Kastigar v. United States*, 406 U.S. 441, 453 (1972). We agree.

After Trimiew confirmed that she would not testify before the grand jury, the district court held Trimiew in contempt and placed her in the custody of the United States Marshal.

ANALYSIS

18 U.S.C. § 6002 states in pertinent part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination to testify . . . before or ancillary to – a court or grand jury of the United States, . . . no testimony or other information compelled under the order . . . may be used against the witness *in any criminal case*. . . . (emphasis added).

The Supreme Court has held that the United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against self-incrimination by conferring use immunity, as provided by 18 U.S.C. § 6002. *Kastigar*, 406 U.S. at 453 (1972).

The Court further held that if a witness is indicted after testifying before a grand jury, the district court should hold an evidentiary hearing. At this hearing (a *Kastigar* hearing), the government would have the burden of showing, by a preponderance of the evidence, that the evidence it proposed to use was derived from a legitimate source wholly independent of the compelled testimony. *Id.* at 460, 461.

In *Kastigar*, the Supreme Court held that use immunity alone is coextensive with the scope of the privilege against self-incrimination. *Kastigar*, 406 U.S. at 453. The Court stated that "[T]he privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' " *Id.* The Court also stated, "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Id.* at 460. The *Kastigar* court's decision was based on a single jurisdiction situation. *Id.* at 457.

Trimiew contends that the district court abused its discretion and denied her Fifth Amendment privilege against self-incrimination by refusing to order that special safeguards beyond those provided by *Kastigar* be taken to ensure against accidental or intentional use of her compelled testimony in possible prosecutions in more than one federal jurisdiction.

Specifically, appellant argues that the multi-jurisdictional nature of the investigation, allegedly involving the Justice Department, United States Attorney's Offices in different districts, the FBI, and the ATF, subjects her to an extremely high risk that her Fifth Amendment rights would be violated. Although this appeal presents an issue of first impression, we are unpersuaded by Trimiew's contentions.

Trimiew believes that information sharing has been and will be taking place among the prosecuting authorities in different districts. She is probably correct. Fed.R.Cr.P. 6 (e)(2) provides that grand jury testimony

and records are generally kept secret. This rule also, however, provides that government attorneys may disclose information obtained through a grand jury to other government attorneys or government personnel. Fed.R.Cr.P. 6(e)(3)(A). In fact, the Department of Justice Manual states that it is the policy and intent of Rule 6 to share grand jury information wherever appropriate. Department of Justice Manual §9-11--260 (1992 Supp.).

Based on this sharing of information, appellant argues that if she testifies in Spokane and is later indicted in another jurisdiction, she will *never* be able to trace or prove violations of her Fifth Amendment privilege. She argues that because so many agencies are investigating the actions of the animal rights movement throughout the United States, the information will become intertwined, and it will be impossible to create a clear history of what information was obtained through which of the various sources, including Trimiew's testimony to the grand jury in Spokane. This contention provides no basis for the imposition of special protections prior to indictment.

As the district court held, the procedure afforded Trimiew by a *Kastigar* hearing provides sufficient protection of her Fifth Amendment rights.[1] The multi-jurisdictional nature of the investigation may add a layer to any eventual *Kastigar* hearing. This does not, however, create a situation where it will be impossible to determine the origin of the information. If Trimiew is indicted in any

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[1] Supporting this position is this court's recent adoption of the holding of *United States v. Schwimmer*, 882 F.2d 22 (2d Cir. 1989). *In Re Grand Jury Proceedings (Garcia-Rosell)*, 889 F.2d 220, 222 (9th Cir. 1989).

jurisdiction, she will be entitled to a *Kastigar* hearing in order to determine whether her indictment was based in any way on her own testimony to the grand jury in Spokane. *See* 18 U.S.C. § 6002; *Kastigar*, at 460-61.

Accordingly, the district court's judgment of contempt is **AFFIRMED**.

APPENDIX 5

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	)	No. 93-35953
KIMBERLY TRIMIEW,	)	DC# MAG-93-330-WFN
Witness-Appellant,	)	Eastern Washington (Spokane)
vs.	)	
UNITED STATES OF AMERICA,	)	ORDER
Appellee.	)	

Filed: October 20, 1993

Before: SCHROEDER, D. W. NELSON and THOMPSON, Circuit Judges

The district court held Witness/Appellant Kimberly Trimiew in contempt of court and ordered her confined for refusing to answer questions before the grand jury. The district court also denied Trimiew's motion for bail pending appeal. Trimiew filed a timely notice of appeal.

Trimiew now moves for bail pending appeal in this court. Under the recalcitrant witness statute, no person confined pursuant to an order of civil contempt shall be admitted to bail pending appeal if it appears that the appeal is frivolous or taken for purposes of delay.[1] 28

[1] 28 U.S.C. § 1826(b) states in pertinent part:
No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the deter-

U.S.C. § 1826(b); *In re Grand Jury Proceedings (Goodman)*, 825 F.2d 224 (9th Cir. 1987).

In denying the motion for bail, the district court found that the appeal was not frivolous or entered for purposes of delay. The district court nevertheless denied bail because it applied the "substantial question" test for bail pending appeal in a direct criminal appeal. The district court applied the wrong test. *See* 18 U.S.C. § 3143(b).[2]

Trimiew contends that she is a target of grand juries in Oregon, Eastern Washington and possibly three other districts. Trimiew states that her appeal will urge that she is entitled to Fifth Amendment protections which were not contemplated by the Supreme Court in *Kastigar v. United States*, 406 U.S. 441 (1972).

In *Kastigar*, the Supreme Court held that the government can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against self-incrimination by conferring use immunity protections. *Kastigar*, 406 U.S. 441, 453. Trimiew is correct in asserting that *Kastigar* does not address the issue she poses, namely whether it would be appropriate for the district court to

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mination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay.

[2] 18 U.S.C. 3143(b) states in pertinent part:
"the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal . . . be detained, unless the judicial officer finds – . . . that the appeal raises a substantial question of law."

invoke special protections in order to afford the witness Fifth Amendment protections against prosecution in other districts.

Trimiew's issue on appeal is not frivolous. Accordingly, appellant's motion for bail pending appeal is granted.

This case is remanded to the district court for the limited purpose of enabling that court to establish appropriate conditions of release.

Counsel

Stephen A. Houze, Portland, Oregon; Leslie R. Weatherhead, Spokane, Washington, for Witness-Appellant Kimberly Trimiew.

Frank Wilson, Assistant United States Attorney, Spokane, Washington, for Appellee United States of America.

APPENDIX 6

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

In Re: KIMBERLY JEANNINE TRIMIEW, Respondent.	MAGISTRATE NO. 93-0330A-01 ORDER (Filed Oct. 06, 1993)

Hearings regarding Ms. Trimiew's appearance before the grand jury were held on October 5, 1993 before the undersigned. Appearing on behalf of the government was Assistant United States Attorney Frank Wilson; appearing on behalf of Ms. Trimiew were Stephen Houze and Les Weatherhead. This Order is intended to memorialize the oral rulings of the court. Accordingly,

IT IS ORDERED:

1. The Motion for Reconsideration is **DISMISSED AS MOOT** in regards to the request that this grand jury not be permitted to return an indictment against Ms. Trimiew subsequent to any immunized testimony and is **DENIED IN ALL OTHER RESPECTS.** Ms. Trimiew's motion requests the court to order the government to not seek an indictment from the same grand jury that would hear her immunized testimony. At the hearing, the government indicated that it is the policy of the United States Attorney's Office in the Eastern District of Washington to not seek indictments of witnesses by a grand jury which heard that witness's testimony. This is in keeping with

the Ninth Circuit's admonitions found in *United States v. Zielezinski*, 740 F.2d 727, 733 (9th Cir. 1984).

2. Kimberly Jeannine Trimiew is in contempt of court for refusing to answer questions posed of her in front of the grand jury.

3. The Motion for Release Pending Appeal under 28 U.S.C. § 1826(b) and 18 U.S.C. § 3143(b) be and the same is hereby **DENIED**. The court finds that the appeal is not frivolous nor entered for purposes of delay, but the appeal does not raise a substantial question of law. This court believes that Ms. Trimiew's request for procedural protection is not supported by the law of the Ninth Circuit, and therefore there is little likelihood that she will succeed on the merits of this appeal. The court is aware that the recalcitrant witness statute by its language does not require that an appeal raise a substantial question of law, however the language in § 1826(b) does not preclude such a requirement. Though the Ninth Circuit has not addressed this issue, *see Goodman v. United States*, 825 F.2d 224 (9th Cir. 1987), the court is in agreement with *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972) that a determination on whether to grant a release pending appeal must include the likelihood of an error by this court. *Id.* at 740 n. 13. *See, also, In Re Grand Jury Subpoena Dated Nov. 12, 1991*, 792 F. Supp. 1431 (S.D. Fla. 1992).

4. The Motion for a Stay Pending Appeal be and the same is hereby **DENIED.**

5. Kimberly Jeannine Trimiew shall be confined in the custody of the United States Marshal until such time as she is willing to testify before the grand jury. This period of confinement shall not exceed the term of the

grand jury, including extensions, but in no event shall such confinement exceed eighteen (18) months.

6. If Kimberly Jeannine Trimiew indicates she is willing to testify, she will be immediately released whether or not the grand jury is currently in session. She shall then make herself available and give testimony as soon as the grand jury reconvenes.

The Clerk is directed to enter this Order and forward copies to counsel and the United States Marshal.

DATED this 5 day of October, 1993.

/s/ Wm. Nielsen
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

APPENDIX 7

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

IN RE GRAND JURY PROCEEDINGS	)	Panel No. 92-1S
(KIMBERLY JEANNINE TRIMIEW)	)	ORDER
	)	(Filed Sep. 17, 1993)

A hearing was held on the government's Petition for an Order to Show Cause on September 16, 1993 before the undersigned. Appearing on behalf of the government was Assistant United States Attorney Frank Wilson; appearing on behalf of Ms. Trimiew was Stephen Houze and Les Weatherhead. This Order is intended to memorialize the oral rulings of the court.

IT IS ORDERED that

1. The government's Petition for an Order to Show Cause be and the same is hereby **DENIED**.

2. Ms. Trimiew's request that the government set out in writing the information it currently possesses regarding her alleged criminal activities be and the same is hereby **DENIED**.

3. Ms. Trimiew's request that the subpoena issued May 21, 1993 be held as no longer valid be and the same is hereby **DENIED.**

The Clerk is directed to file this Order and provide copies to counsel.

DATED this 17 day of September, 1993.

/s/ Wm. Nielsen
WM. FREMMING NIELSEN
UNITED STATES DISTRICT
JUDGE

APPENDIX 8

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions – Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 9

18 U.S.C. § 6001. Definitions

As used in this part [18 U.S.C.S §§ 6001 et seq.] –

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas [sic.] and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code [28 USCS 81 et seq.], a United States bankruptcy court established under chapter 6, title 28, United States Code [28 USCS §§ 151 et seq.], the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

(Added Oct. 15, 1970, P. L. 91-452, Title II, § 201(a), 84 Stat. 926; Sept. 30, 1978, P. L. 95-405, § 25, 92 Stat. 877; Nov. 6, 1978, P. L. 95-598, Title III, § 314(l), 92 Stat. 2678; Oct. 10, 1980, P. L. 96-417, Title VI, § 601(l), 94 Stat. 1744; April 2, 1982, P. L. 97-164, Title I, Part B, § 164(l), 96 Stat. 50.)

18 U.S.C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part [18

USCS §§ 6001 et seq.], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(Added Oct. 15, 1970, P. L. 91-452, Title II, § 201(a), 84 Stat. 927.)

18 U.S.C. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General,

request an order under subsection (a) of this section when in his judgment –

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Oct. 15, 1970, P. L. 91-452, Title II, § 201(a), 84 Stat. 927; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7020(e), 102 Stat. 4396.)

APPENDIX 10

28 U.S.C. § 1826. Recalcitrant Witness

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of –

(1) the court proceeding, or

(2) the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.